

Laxman (Migration) [2020] AATA 1145 (30 March 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Shanigarapu Laxman

CASE NUMBER: 1812028

DIBP REFERENCE(S): BCC2017/1436030

MEMBER: Jade Murphy

DATE: 30 March 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 189 - Skilled - Independent visa.

Statement made on 30 March 2020 at 9:07pm

1.

2. **CATCHWORDS**

MIGRATION – cancellation – Skilled Independent (Permanent) (Class SI) visa – Subclass 189 – Skilled – Independent – incorrect information and bogus document in visa application – claimed employer and job tasks – skills assessment based on claimed work experience – employment not included on tax returns – applicant's belief that he was employed as a contractor – provision of ABN to employer – company no longer exists – consistent description of job tasks by applicant and witness – amended tax returns – discretion to cancel visa – decision under review set aside

3.

4. **LEGISLATION**

5. *Migration Act 1958 (Cth), ss 5(1)(c), 101(b), 103, 107, 108, 109(1), 375A*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 189 - Skilled - Independent visa under s.109(1) of the *Migration Act 1958* (the Act).
7. The delegate cancelled the visa on the basis that the applicant provided incorrect information and a bogus document to the Department with his application for a Skilled Independent visa. The delegate considered the applicant's claims of previous work employment to be incorrect (contrary to s.101 of the Act), and as the applicant's skills assessment was based on his claims of previous work experience, the delegate considered this to be a bogus document (contrary to s.103 of the Act). The issue in the present case is whether that ground for cancellation is made out (pursuant to s.108 of the Act), and if so, whether the visa should be cancelled (pursuant to s.109 of the Act).
8. The applicant appeared before the Tribunal on 6 January 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Srinivas Mandala (friend), Ms Hema Peri (partner), and Mr Ramneet Singh (friend).
9. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

11. Section 375A Certificate

12. On 28 October 2019, the Tribunal wrote to the applicant and disclosed that the Department's file contained a certificate issued on 18 May 2018 in accordance with s.375A of the Act. An un-redacted copy of the certificate was attached to the letter. The Tribunal told the applicant that its preliminary view is that the certificate is validly made and that release of the information would be contrary to the public interest as set out in the certificate. The letter set out the reasons why the Tribunal had taken this preliminary view. The Tribunal asked the applicant to make any submissions regarding the validity of the certificate. On 11 November 2019 the applicant responded and submitted he remained of the view that the certificate is invalid. At the outset of the hearing, the Tribunal told the applicant it had considered his submission in response but that it considered the certificate to be valid and was proceeding on that basis. The applicant made no further submissions with respect to the certificate.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
14. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the

requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

15. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

16. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with ss.101 and 103 in the following respects:
 - The applicant provided incorrect information with his application for a Skilled Independent visa. Specifically, he claimed on his application form that he had been employed at Python Technologies as a Development Programmer between 13 January 2014 and 22 March 2015. The delegate considered this to be incorrect information because evidence received from the Australian Taxation Office (ATO) for the Financial Years 2015 and 2016 showed that the applicant's main salary and wage occupation was as a commercial cleaner and that the visa applicant worked for Ikon Administration Pty Ltd and RK Group Pty Ltd. The ATO information did not list Python Technologies anywhere as an employer. As a result, the delegate concluded that the applicant had not complied with s.101(b) of the Act.
 - The applicant provided a bogus document with his application. Specifically, the delegate considered the skills assessment to be a bogus document within the meaning of part (c) of s.5(1) of the Act as it was obtained because of a false or misleading statement, namely that the applicant was employed at Python Technologies as a Development Programmer. As a result, the delegate concluded that the applicant had not complied with s.103 of the Act.
17. *The applicant's supporting documents on review*
18. In addition to the material provided to the Department and before the Tribunal as part of the departmental file, the applicant provided the following on review:
 - Written submissions dated 21 October 2019 and supporting documents;
 - Written submissions dated 11 November 2019 and supporting documents;
 - Statutory Declaration of the applicant dated 3 January 2020;
 - Tax Invoice for accounting service dated 2 November 2019;
 - Work reference letters dated 3 and 7 January 2020 from National Australia Bank; and
 - Post-hearing written submissions dated 16 January 2020.
19. The Tribunal has considered all documents and information before it in support of this review. This includes all documents that were previously provided to the Department in response to the Notice of Intention to Consider Cancellation (the NOICC).

20. *The applicant's evidence at hearing*

21. In addition to the written submissions and documentary evidence already provided, the Tribunal asked the applicant whether he would further like to respond to the delegate's concerns as outlined in the NOICC. The applicant replied that he denied that his claim of work experience for Python Technologies as a Development Programmer was not false. The applicant stated that he had believed he was undertaking work for Python Technologies as a 'contractor' rather than an 'employee' and that by supplying his employer with his ABN that this sufficed for ATO purposes. The applicant stated that he did not think he had to include anything further on his tax return. The applicant stated that it was an administrative error and did not know that both works undertaken on his ABN and TFN had to be disclosed on his tax return. The Tribunal accepts the applicant's evidence regarding why his initial tax returns did not declare his work with Python Technologies.
22. The Tribunal queried why the applicant's work contract provided states that he was a salaried full-time employee when he is now stating that he was a contractor. The applicant stated that he believed it was a generic work contract and stated he did not read it thoroughly and just signed it. The Tribunal asked the applicant questions about three work projects which he stated in written submissions that he had worked on during his time with Python Technologies. The applicant was able to provide answers that were consistent with the documentary evidence, particularly in circumstances where the details are now six/seven years old. The applicant was also able to provide answers to the Tribunal regarding the workplace which were consistent with other corroborative evidence on file. The Tribunal accepts the applicant's evidence regarding this, particularly in circumstances where it was his first professional job and first job in another country.
23. The Tribunal asked to speak with someone from Python Technologies but the applicant stated that the company no longer exists (filed for bankruptcy) and that he is no longer in touch with his former colleagues. The applicant made available for questioning one witness, Mr Mandala, who worked with the applicant at Python Technologies at the relevant time. The Tribunal considers the evidence of Mr Mandala consistent and corroborative. In particular, Mr Mandala gave evidence that supported the type of work duties the applicant carried out within the company and the general workplace organisation and structure.
24. On review, the applicant provided the Tribunal with evidence of accounting advice that he had sought after receiving the NOICC from the Department. Further, the applicant provided evidence of amended ATO tax returns for the relevant financial years detailing his employment with Python Technologies. The applicant gave evidence that these were prepared with the assistance of his accountant on review of financial documents. The Tribunal accepts the applicant's ATO issued amended tax returns as evidence that the applicant had made an administrative error and when told of the error, he has made the relevant correction with the ATO.
25. The applicant gave evidence at hearing that Python Technologies was an unreliable employer in terms of the manner in which they paid their employees and also misled the applicant regarding his visa obligations. The Tribunal notes that although this does not take away from the applicant's own responsibility to comply with his visa obligations, corroborative evidence of the employer's culture and treatment of staff was provided by Mr Mandala at hearing.

26. Findings

27. The Tribunal has considered the circumstances in which the Department formed its conclusions that the applicant's claims of work experience as a Development Programmer at Python Technologies was false and that the subsequent skills assessment was a bogus document.
28. The Tribunal has formed a different view to that of the Department. The Tribunal has had the opportunity to obtain evidence not available to the Department at the time of making its decision. Particularly persuasive were the amended ATO tax returns now reflecting the applicant's work for Python Technologies. The Tribunal also had the opportunity to question the applicant about his employment with the Python Technologies and what work was carried out by the organisation and him individually. The Tribunal found the evidence consistent with documentary evidence and supported by the oral evidence of his former colleague, Mr Mandala.
29. As a result, the Tribunal also finds the applicant's explanation regarding why his work experience with Python Technologies was not declared on his initial tax returns for the relevant years plausible and finds it unlikely it is not a genuine statement. As the skills assessment was found to be a bogues document based on his work experience with Python Technologies not being true, the Tribunal also finds that the skills assessment is not a bogus document.
30. For these reasons, the Tribunal is not satisfied that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. It therefore follows that the discretionary power to cancel the applicant's visa does not arise.

DECISION

31. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 189 - Skilled - Independent visa.

Jade Murphy
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and

^{*}This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

¹

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.